Supreme Court, U.S.
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No. 92-775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETH MAULA,

Petitioner,

—against—

LLOYD FRECKLETON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, *Maula v. Freckleton*, is published at 972 F.2d 27 (2d Cir. 1992), and is appended as Appendix A to petitioner's petition. The opinion of the District Court for the Southern District of New York, *People ex rel. Maula v. Freckleton*, is published at 782 F. Supp. 889 (S.D.N.Y. 1992), and is appended as Appendix B to petitioner's petition. The opinion of the New York State Supreme Court, Appellate Division, First Department, *People ex rel. Maula v. Freckleton*, affirming the denial by the New York State Supreme Court, Bronx County of petitioner's petition for a state writ of habeas corpus, *People ex rel. Maula v. Freckleton*, is published at 176 A.D.2d 590, 574 N.Y.S.2d 753 (1st Dept. 1991). The denial,

without opinion, by the New York State Court of Appeals of petitioner's application for leave to appeal from the Appellate Division decision appears at 78 N.Y.2d 862, 578 N.Y.S.2d 877 (1991). The opinion of the New York State Supreme Court, Bronx County, *People ex rel. Maula v. Freckleton*, Bronx County Index No. 8497-1991 (Supreme Court, Bronx County, April 5, 1991), denying the state petition, is not reported, but it is reprinted in attached Appendix A.

STATEMENT OF THE CASE

In August 1986, petitioner was indicted in New York State Supreme Court, Bronx County, for Murder in the Second Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Use of a Firearm in the Second Degree. After both sides had rested at trial, petitioner moved to dismiss all three counts for insufficient evidence. The trial court denied the motion, but later during the same conference informed counsel that it had decided to submit the murder count to the jury, as well as lesser included homicide counts, but would not submit the weapons charges.[1] Pertinent is the following colloquy between defense counsel and the court:

> MR. RAPPAPORT: Are you going to submit any lessor (*sic*) included gun charge?
>
> THE COURT: No.
>
> MR. RAPPAPORT: It's my—
>
> THE COURT: I just gave you what I am submitting.
>
> MR. RAPPAPORT: You're submitting Count 2?

---

1 New York Criminal Procedure Law section 300.40(6)(b) allows the trial court to withhold counts from juries where the "number of counts or the complexity of the indictment requires selectivity of counts by the court in order to avoid placing an unduly heavy burden upon the jury in its consideration of the case." Such counts are "deemed to have been dismissed by the court." New York Criminal Procedure Law § 300.40(7).

THE COURT: No, I'm not.

MR. RAPPAPORT: Not at all?

THE COURT: No.

MR. RAPPAPORT: The guns are not going to the jury at all?

THE COURT: No.

MR. RAPPAPORT: In other words, if they should find him not guilty of all four homicides that's the end of the case?

THE COURT: Yes.

MR. RAPPAPORT: No guns?

THE COURT: No.

MR. RAPPAPORT: I don't have to get involved with a gun discussion. All right.

THE COURT: You don't have a separate position.

MR. RAPPAPORT: I understand that. That is why I didn't request it in my charge—in my request.

The jury convicted petitioner on a lesser included offense of Manslaughter in the First Degree. On direct appeal, the Supreme Court of the State of New York, Appellate Division, First Department, reversed and remanded for a new trial. *People v. Maula*, 138 A.D.2d 307, 526 N.Y.S.2d 441 (1st Dept.), *appeal denied*, 72 N.Y.2d 863, 532 N.Y.S.2d 513 (1988). Under state law, the People of the State of New York were required to obtain a new indictment, since petitioner had been convicted of a lesser included offense not charged in the original indictment. *See People v. Beslanovics*, 57 N.Y.2d 726, 727 (1982); *People v. Mayo*, 48 N.Y.2d 245, 253 (1979). The new indictment charged petitioner with Manslaughter in the First Degree, Criminal Use of a Firearm in the First Degree, Criminal Use of a Firearm in the Second Degree, and Criminal Possession of a Weapon in the Second Degree. It thus included the two weapon counts that had not been submitted to the jury

at the first trial.[2] After a second jury trial, petitioner was convicted of Criminal Possession of a Weapon in the Fourth Degree.

The State Court Appeal

On direct appeal, petitioner challenged only his sentence, and the Supreme Court of the State of New York, Appellate Division, First Department, remanded for resentencing. *People v. Maula*, 163 A.D.2d 180, 558 N.Y.S.2d 42 (1st Dept. 1990). After petitioner was resentenced, on direct appeal he again challenged only his sentence. The Appellate Division affirmed the judgment of conviction. *People v. Maula*, 170 A.D.2d 259, 565 N.Y.S.2d 1014 (1st Dept. 1991).

The Petition for a State Writ of Habeas Corpus

Subsequently, petitioner moved the Supreme Court of the State of New York, Bronx County, for state *habeas corpus* relief on the ground that his federal and state constitutional protections against double jeopardy were violated when he was tried again on the gun possession charges, which he claimed were "dismissed" on the factual merits during petitioner's first trial. Petitioner relied primarily upon New York Criminal Procedure Law section 300.40 and state case law interpreting that statute to mean he had been acquitted of those charges.

Respondent opposed the petition on the procedural ground that petitioner failed to raise the double jeopardy claim in his direct appeals. On the merits, respondent argued that no double jeopardy violation had been committed since petitioner

2 New York Criminal Procedure Law section 470.55(1) provides: "Upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgment and ordering such new trial, such accusatory instrument is deemed to contain all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed upon appeal or upon some other post-judgment order."

was retried on counts previously dismissed for reasons other than the sufficiency of the proof of petitioner's guilt of those charges, and that such counts are reinstated pursuant to New York Criminal Procedure Law section 470.55 upon reversal on appeal.

The Supreme Court of the State of New York, Bronx County dismissed the petition. Although the court found that petitioner's double jeopardy claim was raised appropriately in the *habeas* petition, it held that since "there was no dismissal based upon a failure of proof, double jeopardy did not bar petitioner's second trial on the gun counts." *People ex rel. Maula v. Freckleton*, Bronx County Index No. 8497-1991 (Supreme Court, Bronx County, April 5, 1991) (Appendix A).

The State Appellate Division, First Department affirmed the order dismissing the petition because "the record . . . indicates that the decision not to submit these [weapon possession] counts was not based on legal sufficiency, and consequently the petitioner was not deemed to have been acquitted of these charges. Therefore, reprosecution on these counts was not barred by double jeopardy." *People ex rel. Maula v. Freckleton*, 176 A.D.2d 590, 574 N.Y.S.2d 753 (1st Dept. 1991). In his brief to the Appellate Division, petitioner raised the same arguments he asserted in the Supreme Court, Bronx County. On November 19, 1991, the Honorable Sol Wachtler, former Chief Judge of the Court of Appeals of the State of New York, denied petitioner's application for leave to appeal to that court. *People ex rel. Maula v. Freckleton*, 78 N.Y.2d 862, 578 N.Y.S.2d 877 (1991).

The Petition for a Federal Writ of Habeas Corpus

In a petition to the United States District Court for the Southern District of New York [91 Civ. 8056 (DNE)], petitioner sought a writ of habeas corpus on the ground that his state and federal double jeopardy protections were violated when he was retried on the weapon counts, arguing that dismissal of the non-submitted counts was equivalent to an acquittal on the merits. In a supplemental memorandum of law,

petitioner asserted that non-submission of the weapon counts without "manifest necessity" violated the Double Jeopardy Clause of the United States Constitution.

Respondent moved to dismiss the petition on the ground it contained a mix of exhausted and unexhausted claims, arguing that petitioner failed in state court to advance his double jeopardy theory that the trial court lacked manifest necessity for withholding weapon counts from the jury. Respondent also sought denial of the writ on the ground that petitioner's claim relied exclusively on interpretation of state statutory law, and opposed a hearing in federal court on the ground that any facts underlying petitioner's double jeopardy claim were binding matters of trial record.

On the merits, respondent argued that non-submission of the counts was not tantamount to an acquittal since dismissal of those counts involved no resolution of the factual elements of those charges. Finally, respondent argued that petitioner's newly-raised theory that the trial court lacked manifest necessity for dismissing the weapon charges was not triggered in this case because petitioner consented to the court's action.

District Court Judge Edelstein denied the writ of habeas corpus on its merits after finding that petitioner exhausted his claim of double jeopardy. Without specifically addressing respondent's claim that petitioner submitted a mixed petition because he had advanced a different double jeopardy theory in the state courts, the court held that "[p]etitioner expressly presented a federal constitutional double jeopardy claim to New York's Appellate Division by entitling his brief's primary argument 'Did the Court below err in finding that the submission of the weapon counts to the jury in the second trial was not a violation of double jeopardy as set forth in the Constitution of the United States' " (P. 37).[3] Noting petitioner had relied on federal precedent and state cases employing United States Supreme Court precedent, the court also wrote

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3 Numerals preceded by "P." refer to the pages of the petition and its annexed appendix.

> Furthermore, the state habeas courts rejected petitioner's claim for relief on double jeopardy grounds, which reveals their awareness of this issue. Even if petitioner did not expressly present a federal constitutional double jeopardy claim, the New York courts were alerted to the existence of a possible federal constitutional claim and had a fair opportunity to adjudicate it.
>
> (P. 38).

On the merits, the court found that the state court's decision at the first trial not to submit gun counts to the jury did not rest on a determination of insufficient evidence prohibiting retrial on those counts (P. 41-42). The court concluded nevertheless that the federal "manifest necessity" standard applicable to mistrials governed here, since "a mistrial and non-submission of charges implicate similar double jeopardy concerns" (P. 44).

> In both cases, a defendant's trial ends before resolution of the merits, which raises the possibility of a retrial. While in each scenario a defendant may welcome a judge's decision to abort an ongoing proceeding, without further emotional and financial strain or the ongoing stigma attached to being under indictment. Accordingly, a defendant who objects to non-submission of a charge opts for final resolution today in the current trial. By such objection, a defendant precludes a retrial absent manifest necessity for not submitting the count. On the other hand, a defendant who consents to non-submission of a count gambles that the state will either not initiate a retrial or that a second trial will prove more favorable than the current proceeding. In such a scenario, a defendant accepts the burden associated with a retrial unless the prosecution or the court acted in bad faith to obtain defendant's consent.

(P. 44). The court thus held that defendants are required to object to non-submission of counts in order to invoke the protections against double jeopardy (P. 45-47).

Holding that petitioner consented to the non-submission of the weapon counts, the court did not reach the question of whether respondent demonstrated a manifest necessity for the trial court's ruling (P. 47-51).[4] Citing to relevant portions of the trial transcript and a hearing conducted on the habeas petition, the court wrote that "[t]his record reflects that petitioner's counsel understood that the judge would not submit the gun charge to the jury," yet expressly consented to this ruling (P. 49). Alternatively, viewing the "totality of the circumstances," the court ruled that petitioner impliedly consented to the trial court's decision.

> [Counsel] obviously understood that Justice Warner had decided not to send the gun counts to the jury. The trial transcript reveals that defense counsel repeatedly sought to clarify what counts Justice Warner would send to the jury and that [counsel] fully understood Justice Warner's decision * * * He could have objected to non-submission at this time. He testified before this Court, however, that he chose not to record an objection.

(P. 50).

The court thus applied federal double jeopardy principles, presuming "that the parties' statutory arguments are an aspect of their federal constitutional claims regarding whether retrial in this instance violates the double jeopardy clause" (P. 39). It expressly declined to "determine whether any result automatically flows from, or any meaning automatically attaches to, a dismissal pursuant to CPL § 300.40(6)-(7)" (P. 45). Despite "federal constitutional concerns," it also refused to "intrude on the right of state courts to interpret state statutes," namely the

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4 Petitioner's assertion that the District Court "correctly found that there was no manifest necessity to warrant the non-submission of the gun counts to the jury in the first instance" (P. 12) is simply incorrect. Rather, the court held that "[b]ecause petitioner consented to non-submission of the weapons counts, retrial is appropriate without requiring the State to show manifest necessity for Justice Warner's decision not to submit the gun counts to the jury" (P. 51).

retrial provision of New York Criminal Procedure Law section 470.55(1) (P. 47).

The Decision of the Court of Appeals

The Second Circuit affirmed the District Court's decision "substantially for the reasons expressed in Judge Edelstein's opinion" (P. 26). After deeming petitioner's claims exhausted, the court deferred to the state courts' findings of state procedural law that the trial court's decision not to submit the weapon counts was not an "acquittal" for double jeopardy purposes (P. 27). It also agreed with the district court that the double jeopardy standard normally applied to mistrial scenarios, *i.e.*, the manifest necessity requirement, should be applied in the context of non-submission of counts under New York Criminal Procedure Law § 300.40(7) (P. 27-28). Finally, it agreed that a manifest necessity evaluation was unnecessary since petitioner had consented at his first trial to non-submission of the disputed charges (P. 29-30).

> Inferring consent from counsel's failure to object in his case is not only consistent with the requirements of the double jeopardy clause; it also tracks the general principle applied in other areas of trial practice, when failure to object to a ruling, which at the time it is made or proposed could readily be changed, will bar future attempts to review that ruling.

(P. 29).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raise the Question Presented in the petition.

The sole Question Presented in the petition is whether the court below denied petitioner his federal constitutional double jeopardy rights by "construing the provisions of the New York Criminal Procedure Law Section 300.40(7) so as to affirm his conviction for the crime of Criminal Possession of a Weapon in

the Fourth Degree?" (P. i). The Second Circuit and the District Court for the Southern District of New York did not decide this question, however, and the facts of record will not support a determination of that question by this Court.

The Second Circuit affirmed the District Court's decision "substantially for the reasons expressed in Judge Edelstein's opinion," writing "primarily to amplify the concept of consent in this context" (P. 26-27). It did not "construe" New York Criminal Procedure Law § 300.40(7), or any other state provision, but merely applied federal double jeopardy standards and rules of evidence to nonsubmission of petitioner's weapons counts at his first trial (P. 27-29). Indeed, the court expressly deferred to the state courts' determination that nonsubmission of charges in this case did not constitute an "acquittal" (P. 27).

Similarly, and even more explicitly, the District Court applied federal double jeopardy law to the facts of the case (P. 38-51), rather than attempt to "determine whether any result automatically flows from, or any meaning automatically attaches to, a dismissal pursuant to CPL § 300.40(6)-(7)" (P. 45). Thus, the question petitioner puts to the court cannot be extracted from the opinions below.

Even though the lower courts held that petitioner's double jeopardy claim was exhausted (P. 26, 36-38), principles of comity and federalism prevent this Court from considering an issue not previously adjudicated in state court. *See Illinois v. Somerville*, 410 U.S. 458 (1973); *Duncan v. Tennessee*, 405 U.S. 127 (1972); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). Indeed, the record does not enable resolution of petitioner's question because it was not resolved during the state proceedings. Throughout, petitioner either completely neglected a double jeopardy claim, or argued in limited fashion that the trial court's decision not to submit lesser weapon counts to the jury was tantamount, under New York Criminal Procedure Law § 300.40(7), to an acquittal barring reprosecution, a theory that was considered and rejected by three state courts. Only upon filing a supplemental memorandum of law in the District Court did petitioner advance a new

double jeopardy theory, that his separate double jeopardy right to have his fate determined by one jury panel was abridged in the absence of manifest necessity for nonsubmission of the charges. As noted, upon adopting this theory as a matter of federal constitutional law, the District Court declined to interpret New York Criminal Procedure Law section 300.40(7) without prior guidance from the state courts (P. 45). Thus, on the record before it, this Court cannot achieve an informed resolution of petitioner's question, which by its terms involves state law.

2. The affirmed factual findings that petitioner consented to non-submission of the weapons charges are dispositive of petitioner's double jeopardy claim, rendering further review unnecessary.

Even in the absence of the essential factual predicate of the Question Presented, *i.e.*, that the courts below interpreted New York Criminal Procedure Law section 300.40(7) in context of the Double Jeopardy Clause, review on the merits by this Court is possible, *see Granberry v. Greer*, 481 U.S. 129, 134-35 (1987) (reaching merits of unexhausted claim can be in best interests of all parties and courts where habeas applicant does not raise colorable federal claim), but would be academic for the additional reason that affirmed findings of fact are dispositive and not susceptible to further review by the Supreme Court. 28 U.S.C. § 2254(d). *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (Supreme Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

The Second Circuit rejected petitioner's double jeopardy claims based on two factual findings. Petitioner apparently does not seek further review of the first finding (on both state and federal habeas review) that the trial court's decision not to submit the weapons charges did not rest on a "factual resolu-

tion" regarding those charges, and was therefore not an "acquittal" for double jeopardy purposes (P. 15, 27, 41-42, 45).

As for whether the petitioner consented to the trial court's decision not to submit the weapons charges, thus requiring respondent to show "manifest necessity" for it, two federal courts have found, after thorough review, that petitioner indeed consented to this decision (P. 27-30, 47-51). This Court must presume this determination correct, *Rushen v. Spain*, 464 U.S. 114, 120 (1983); *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982); *Sumner v. Mata*, 455 U.S. 591, 598 (1982), and petitioner cannot demonstrate "a very obvious and exceptional" error here, *Graver Mfg. Co. v. Linde Co.*, 336 U.S. at 275, since the colloquy at trial reveals he knowingly consented to the court's ruling. After the court clarified repeatedly to defense counsel that it would not submit the weapon counts, counsel stated "I don't have to get involved with a gun discussion. All right." *See* pages 2-3, *supra*. The court then noted, "You don't have a separate position," to which counsel replied, "I understand that. That is why I didn't request it . . . in my [charge] request." *Id.* Under the circumstances, petitioner clearly "exercised his choice in favor of terminating the trial" as to the gun possession counts. *See Lee v. United States*, 432 U.S. 23, 32-33 (1977) (petitioner consented to dismissal of information, where, after initially making motion to dismiss, petitioner never sought to withdraw motion and did not object to court's decision to dismiss case without having made a formal finding on petitioner's guilt or innocence).

In sum, the Second Circuit did not decide the Question Presented. Additionally, this habeas appeal turns on affirmed factual findings binding upon this Court, rendering petitioner's claim unworthy of review.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM PART 46

IND. NO. 8497-1991

PEOPLE EX REL. KENNETH MAULA,

Petitioner,

—against—

LLOYD FRECKLETON, Warden of the Rikers Island Correctional Facility

Respondent.

PHYLIS SKLOOT BAMBERGER, JUSTICE:

The petitioner seeks a writ of habeas corpus for release from custody urging that the judgment convicting him of criminal possession of a weapon in the fourth degree, P.L. § 265.01, and sentencing to one year in prison is unconstitutional. He asserts that the conviction is a nullity because the state and federal constitutional provisions against double jeopardy barred his trial on that charge. For the following reasons, the petition is dismissed.

In December 1986, petitioner was tried on an indictment that charged him with committing murder in the second degree, P.L. § 125.25(1) (count 1), criminal possession of a weapon in the second degree, P.L. § 265.03 (count 2), and criminal use of a weapon in the second degree, P.L. § 265.08(1) (count 3). At the close of the evidentiary portion of the trial, the petitioner made a motion for a trial order of dismissal of counts one and two on the ground that the evidence was not legally sufficient to establish the crimes charged. C.P.L. § 290.10. He asked for dismissal of count three because People failed to prove the underlying C felony, in effect urging insufficiency of the evidence. The court denied this motion. However, it then ruled

that it would submit to the jury the charge of murder in the second degree and the lesser included offenses of manslaughter in the first and second degrees and criminally negligent. It refused to submit the two gun charges to the jury.

The jury returned a verdict acquitting petitioner of murder but convicting him of manslaughter in the first degree. On appeal to the Appellate Division, this conviction was reversed and the case remanded for a new trial. 138 A.D.2d 307 (1st Dept. 1988). Because petitioner was convicted only of a lesser included offense for which he had not been indicted, the People had to obtain a new indictment to try petitioner again. *See People v. Beslanovics*, 57 N.Y.2d 726, 727 (1982); *People v. Mayo*, 48 N.Y.2d 245, 253 (1979). By indictment number 4261/88, petitioner was charged with manslaughter in the first degree, P.L. § 125.20(1), criminal use of a firearm in the first degree, P.L. § 265.09(1), criminal possession of a weapon in the second degree, P.L. § 265.03, and criminal use of a weapon in the second degree, P.L. § 265.08(1).

After a second jury trial, petitioner was acquitted of all charges but the lesser included offense of criminal possession of a weapon in the fourth degree. P.L. § 265.01. He was sentenced to serve a definite term of one year for this conviction. On appeal of this conviction to the Appellate Division, the court vacated the sentence holding that the trial court had considered an improper matter at sentencing. On remand, defendant was again sentenced to serve one year and this sentence was affirmed by the Appellate Division in an opinion dated February 21, 1991.

Following the affirmance of his conviction, petitioner brought this habeas corpus petition and asserted for the first time that his conviction of criminal possession of a weapon in the fourth degree violated the federal and state constitutional prohibitions against double jeopardy. Relying upon C.P.L. § 300.40(7), which states that "[e]very count not submitted to the jury is deemed to have been dismissed by the court," petitioner contends the decision by the trial judge during the first trial not to submit the gun charges to the jury constituted a dismissal and that he could not, consistent with the constitutions,

be retried on these charges at the second trial. This Court disagrees.

The People argue that this petition is not the proper procedure to by which to raise the question of whether double jeopardy barred prosecution. The Court rejects this claim because the guarantee against double jeopardy is so fundamental that its successful presentation would prevent the state from even trying the petitioner. *People v. Mayo*, 48 N.Y.2d at 252. Accordingly, the petitioner is entitled to raise his claim. *See People ex rel. Rohrlich v. Follette*, 20 N.Y.2d 297, 302 (1967); *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262 (1966).

The ruling of the judge at the first trial refusing to submit the two gun charges to the jury was a dismissal of those charges. C.P.L. § 300.40(7). But, it was not a decision that the evidence was insufficient to establish those charges. The judge had denied the defense application for a trial order of dismissal in the colloquy immediately preceding his ruling that he would not submit the gun charges to the jury. Because there was no dismissal based upon a failure of proof, double jeopardy did not bar petitioner's second trial on the gun counts. *Pastrana v. Baker*, 55 N.Y.2d 315, 319 (1982); *People v. Mayo*, 48 N.Y.2d at 248 n.1; *People v. Anderson*, 111 A.D.2d 124, 125 (1st Dept. 1985).

The petitioner asserts that *People v. Williams*, 133 A.D.2d 717 (2d Dept. 1987), precludes re-prosecution. However, *Williams* relates to a statutory prohibition involving a partial verdict under C.P.L. § 310.70(2). This statutory provision concerns only the very particular circumstance involving a partial verdict and has no applicability here, where there was no partial verdict. *See People v. Anderson*, 111 A.D.2d at 125.

Petitioner's claim rests on constitutional grounds and he refers to no statutory provision applicable to this case. The reference to C.P.L. § 300.40(7) does not assist him. The first sentence of that section relates to the implied dismissal of counts not submitted to the jury. But the dismissal of the counts of the indictment themselves do not require a finding that it was based upon a finding of insufficiency. *Pastrana v. Baker*, 55 N.Y.2d at 319. The second sentence of § 300.40(7) relates to

the People's right of appeal, *see* Bellacosa, *Practice Commentary to C.P.L. § 290.10*, at 522-26 (McKinney's 1983), which under current law is precluded if the issue is the sufficiency of the evidence and a reversal by an appellate court could result in a new trial. *See People v. Key*, 45 N.Y.2d 111, 120 (1978).

The petition is dismissed. This constitutes the order of the Court.

Dated: Bronx, New York
April 5, 1991